In the Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 339.

COMPAÑIA GENERAL DE TABACOS DE FILIPINAS,
Petitioner,

v.

COLLECTOR OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR RESPONDENT IN OPPOSITION.

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SUBJECT-INDEX

	Page
OPINIONS BELOW	1-2
JURISDICTION	2-3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4-6
THE QUESTIONS	6
SUMMARY OF ARGUMENT	7
ARGUMENT	8-16
Point I.—No jurisdiction. No substantial federal question	8-10
Plaintiff's claim of federal question is based wholly on misapprehension of Insular Court's decision	9-10
Point II.—Even if jurisdiction existed this court would not disturb territorial supreme court's finding of fact, or mixed finding of fact and interpretation of local law, that the sales here in question were actually "made" in the Philippine Islands, and not in the United States, and hence that the income therefrom was from "sources within the Philippine Islands" within the meaning of the local territorial statute	10-12
Point III.—In any event, the Insular Supreme Court's finding that the sales were made in the Philippine Islands, and not in the United States, is right	12-16
CONCLUSION	16-17

TABLE OF CASES

	Page
Alzua *v.* Johnson, 231 U. S. 106	12
Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232	9
Cardona *v.* Quiñones, 240 U. S. 83	12
Compañía General de Tabacos de Filipinas *v.* Collector (*this case below*), 26 Phil. Off. Gaz. 1712	1–2
De Bary *v.* Souer, 101 Fed. 425	14–16
Dowdell *v.* United States, 221 U. S. 325	12
Field *v.* Barber Asphalt Co., 194 U. S. 618	9
Flemister *v.* United States, 207 U. S. 372	12
Harrison *v.* Perea, 168 U. S. 311	12
Holder *v.* Aultman, 169 U. S. 81	14
Ibanez *v.* Hong Kong, etc., B'k'g Corp., 246 U. S. 621	12
Ling Su Fan *v.* United States, 218 U. S. 302	12
Pacific Exp. Co. *v.* Seibert, 142 U. S. 339	9
Serra *v.* Mortiga, 204 U. S. 470	12
Shuenfeldt *v.* Junkermann, 20 Fed. 357	13–14, 15
Stebbins *v.* Riley, 268 U. S. 137	9
Sturges *v.* Crowninshield, 4 Wheat. 197	13

OTHER AUTHORITIES CITED

Benjamin on Sales, p. 1	15
35 Cyc., "Sales", p. 94, Note 80	11, 12–13
Opinion of Acting Attorney General Frierson, 32 Ops. Atty. Gen. 336	10
Rules of this Court—Rules 12, 27, 38, 42	2

CONSTITUTION AND STATUTES

Page

CONSTITUTION—Fourteenth Amendment 9–10

UNITED STATES:

Act of February 13, 1925, Sec. 7, c. 229, 43 Stat. 936–940 ..... 2, 3, 6, 7, 8–10, 17

Organic Act for the Philippines, "Jones Law," Section 3,—Tax Uniformity Clause 2–3, 8–9, 10

PHILIPPINES:

Philippine Income Tax Law, Act No. 2833, Sec. 10 ..... 2, 3, 5, 7, 9, 11

Act No. 2926, Section 7, amending Section 10 of the Income Tax Law 2, 3, 5, 7, 11

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OPINIONS BELOW

The opinion ("decision") of the Court of First Instance of the City of Manila, DEL ROSARIO, J., November 16, 1926 (R. 13–18), in favor of the petitioner, plaintiff in that court, is not officially reported.

The opinion ("decision") of the Supreme Court of the Philippine Islands (R. 20–33), December 6, 1927, in favor of the respondent, Collector of Internal Revenue, appellant in that court, reversing the judgment of the Court of First Instance, is not yet reported in the Official Philippine Reports; but is reported in Vol. XXVI, Philippine Official Gazette, No. 65, May 31, 1928, pp. 1712 *et seq.*

On February 8, 1928, the Philippine Supreme Court, without a formal opinion, overruled the petitioner Tobacco Company's petition for a rehearing (R. 40), JOHNSON and STREET, JJ., then dissenting; their dissenting opinions (R. 40–59), likewise appear in Vol. XXVI, Philippine Official Gazette, No. 65, May 31, 1928, *supra*, at pp. 1714 to 1718, immediately following the opinion of the court.

JURISDICTION

It is submitted that this court is without jurisdiction to grant the writ of certiorari in this case under Section 7 of the Act of February 13, 1925.

PETITIONER HAS NOT COMPLIED WITH THE REQUIREMENT OF RULE 27 (2) (c) OF THE REVISED RULES OF THIS COURT IN CONNECTION WITH RULE 12 (1), made applicable to this case by Rule 42 in connection with Rule 38 (2), THAT IT INCLUDE IN ITS PETITION OR BRIEF A "CONCISE STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED", INCLUDING THE PARTICULAR MATTERS PRESCRIBED BY THE FIRST SECTION OF RULE 12.

NO SUCH STATEMENT APPEARS EITHER IN THE PETITION OR IN PETITIONER'S SUPPORTING BRIEF.

The substantial questions which petitioner seeks to present relate solely to the correctness of the Philippine Supreme Court's construction of a local statute of those Islands, viz., Section 10 of Act No. 2833, the Philippine Income Tax Law, as amended by Section 7 of Act No. 2926. (*Petition, "Reasons for the Allowance of the Writ"*, pp. 7–10.)

The only thing in those "Reasons" of the petitioner which might be said to present a federal question cognizable by this court under Section 7 of the Act of February 13, 1925, is (Petition, p. 9, toward the end of the statement of the second "Reason" assigned):

> The said decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law, because the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in Manila will not now correspond to and

bear a reasonable relation to the difference in the base of the tax.

That, however, does not present any "substantial federal question" within the meaning of the decisons of this court, sufficient to support the jurisdiction. (See *infra*, Point I, pp. 8–10 hereof.)

Section 7 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940, provides:

> Sec. 7. That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, * * * it shall be competent for the Supreme Court of the United States * * * * to require, by certiorari, that the cause be certified to it for review * * * *; and, except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review.

The amount here in controversy does not exceed $25,000. On the contrary, the tax here involved, paid under protest October 18, 1923, amounted only to ₱12009.75, Philippine currency,—that is to say, to $6004.88.

STATUTES INVOLVED

The pertinent language of Section 10 of Philippine Act No. 2833, as amended by Section 7 of Philippine Act 2926, is, as stated by the petitioner (Petition, pp. 7–8):

> "Sec. 10. (a) There shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources by every corporation * * * organized in the Philippine Islands, * * * a tax of three per centum upon such income; and a like tax shall be levied, assessed, collected, and paid annually upon the total net income received in the preceding calendar year from all sources within the Philippine Islands by every corporation * * * organized, authorized, or existing under the laws of any foreign country."

STATEMENT OF THE CASE

This was a suit for refund of ₱12009.75 ($6004.88) income tax, begun by the petitioner-plaintiff, in the Court of First Instance of Manila. An "Agreed Statement of Facts" was filed in that court (R. 8–12), which recites that the defendant, respondent here, is the Collector of Internal Revenue for the Philippine Islands, and that the petitioner-plaintiff is a corporation of Spain licensed to do business in the Philippine Islands and maintaining its principal office in those Islands in the City of Manila, and is the owner of several "haciendas", sugar and oil mills and tobacco factories located in the Islands "destined to the production or manufacture" of tobacco, sugar, copra, and coconut oil, for sale in the Islands and in foreign countries, and has been and is still engaged in the Philippine Islands in the shipping business and in the buying, selling and exportation of those commodities, "and that its business has been, and is being done mainly in the Philippine Islands." It then states (Par. IV, R. 9) that

> "the Philippine branch of the plaintiff corporation on various dates during the year 1922 exported from the Philippine Islands a quantity of centrifugal sugar, of which ten per centum was produced and ninety purchased by it in the Philippine Islands, and which was sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof, by the plaintiff's Philippine branch; and that from such transactions on centrifugal sugar during said year 1922, the plaintiff made a profit of ₱114,226.80, Philippine currency";

and that (Pars. V, VI, VII, R. 10-11) it similarly sold in the same manner during the same year tobacco from which it derived a profit of ₱296,341.19, and some copra and coconut oil upon which it suffered losses amounting to ₱10,243.14. That deducting such losses on the copra and coconut oil from the profits made on the transactions in sugar and tobacco, there remained a net profit of ₱400,324.85, and that (Par. VIII, R. 11),

"the said net profit of ₱400,324.85, together with other gains, profits, or income, were accounted for by the plaintiff on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, thereby subjecting such profits, gains, or incomes to further business deductions—management expenses, losses, etc."

That on those net profits of ₱400,324.85, the defendant-respondent, Collector of Internal Revenue, assessed a tax of three per centum against the plaintiff-petitioner amounting to ₱12,009.75 ($6004.88) under the Philippine Income Tax Law, Act No. 2833, as amended by Act No. 2926; which the plaintiff paid under protest on October 18, 1923; and to recover which sum,—plaintiff's protest having been overruled by the defendant-Collector,—this suit was brought.

The ground on which the Collector assessed the tax was that, the sales being made subject to confirmation in Manila, and the income therefrom being accounted for by the plaintiff Tobacco Company on its books of accounts kept in the Philippine Islands as earnings made by and accruing to the Philippine branch, the sales were really consummated or "made" in Manila, and not in the United States; and, therefore, that the income therefrom is income received from "*sources within the Philippine Islands*" within the meaning of Section 10 of the Philippine Income Tax Law, Act 2833, as amended by Section 7 of Act 2926.

The Court of First Instance (DEL ROSARIO, J., R. 13-18) held for the plaintiff, and directed the tax refund. But on the Collector's appeal the judgment was reversed by the Supreme Court of the Philippine Islands (R. 20-33), which held (R. 29) that, under the circumstances recited in the "Agreed Statement of Facts",

"no sale was actually consummated until after it was ratified and approved by the local branch" (the Tobacco Company's local branch in the Philippine Islands, its principal office at Manila) "and all profits or incomes from such sales were accounted for by the plaintiff on its books kept in the Philippine Islands 'as earnings made by and accruing to the Philippine Branch'";

and that (R. 32),

> "In the instant case, the record is conclusive that all of the sources of plaintiff's income in question had their origin in or were derived from its branch office in the Philippine Islands by and through the products of the Philippine Islands, which were purchased or produced by its branch office in the Philippine Islands, and that all of the sales in question were made through its branch office, and that no sale was actually consummated until such time as it was approved by the branch office both as to terms and conditions, and that an account of all of such sales made in the United States was rendered to the branch office, together with the proceeds, where a full and complete record was kept and made of all of such transactions."

The opinion was written by Mr. Justice Johns; and Chief Justice Avanceña and Justices Street, Malcolm, Villamor, Ostrand, and Villa-Real concurred (R. 33). There was no dissent, but Mr. Justice Johnson "reserved his vote". The Tobacco Company moved for a rehearing (R. 33–39) which was denied on February 8, 1928 (R. 40), at which time, however, Justices Johnson and Street dissented and filed separate dissenting opinions (R. 40–58, and 58–59).

THE QUESTIONS

1. Is any substantial federal question here presented sufficient to sustain the jurisdiction of this court under Section 7 of the Act of February 13, 1925?

2. Should this court disturb the interpretation placed by the Philippine Supreme Court upon the stipulation or "Agreed Statement of Facts" in accordance with local procedure, and the construction of its own local statute in connection therewith, finding that, as a matter of ultimate fact, the sales in question were made in the Philippine Islands, and not in the United States; and hence that, within the meaning of the local statute as interpreted by that court, the income therefrom was derived from "sources within the Philippine Islands"?

3. In any event, was not the finding of the Philippine Supreme Court correct, that the sales here in question were made, as a matter of fact, in the Philippine Islands, and not in the United States?

SUMMARY OF RESPONDENT'S ARGUMENT

Petitioner's counsel misapprehend the decision of the Philippine Supreme Court when they say (Petition, p. 8) that:

> "The Supreme Court of the Philippine Islands has held that the words 'sources within the Philippine Islands', as applied to foreign corporations with branches in the Philippine Islands, *embraces income received from profits on sales made by such corporations of Philippine products in the United States of America.*"

THAT COURT HELD NOTHING OF THE KIND. To the contrary, it recognizes that, if the sales were really made within the United States, the income therefrom would not be taxable under the Philippine statute. It simply holds that, in the present case, upon a proper interpretation of the "Agreed Statement of Facts", the sales here in question were made in the Philippine Islands, and not in the United States.

The position of the respondent Collector is that: (1) There is here presented no substantial federal question sufficient to support the jurisdiction of this court under Section 7 of the Act of February 13, 1925. (2) The finding of the Philippine Supreme Court that, upon a true interpretation of the "Agreed Statement of Facts", the sales here in question were really "made" in the Philippine Islands, and not in the United States, and that, therefore, the income therefrom was "derived from sources within the Philippine Islands" within the meaning of the local income tax law, Act No. 2833, as amended by Act No. 2926, was *a finding of ultimate facts* by that court, *or else a finding on a mixed question of fact and of local procedural law and upon the interpretation of a local statute;* which, not appearing to be "clearly erroneous", will not be disturbed by this court. (3) In any event, the finding that the sales were consummated,—that is to say, "made",—in the Philippine Islands, and not in the United States, was right.

ARGUMENT

POINT I

THERE IS HERE PRESENTED NO SUBSTANTIAL FEDERAL QUESTION SUFFICIENT TO SUSTAIN THE JURISDICTION OF THIS COURT UNDER SECTION 7 OF THE ACT OF FEBRUARY 13, 1925.

As above pointed out ("Jurisdiction", *supra*, p. 2), petitioner nowhere either in its petition or in its supporting brief makes any definite statement of the grounds upon which it invokes the jurisdiction of this court. The amount involved, $6,004.88 (₱12009.75; R. 11, 12), is not sufficient to confer jurisdiction; and the only claim advanced by petitioner which might be said to present a federal question cognizable by this court under Section 7 of the Act of February 13, 1925, is the paragraph occurring on page 9 of its petition, towards the end of the second of its "Reasons for the Allowance of the Writ", wherein, after stating the principal proposition of such second "Reason" that (Petition, p. 8),

> "2. The Supreme Court of the Philippine Islands has held that the words 'sources within the Philippine Islands', as applied to foreign corporations with branches in the Philippine Islands embraces income received from profits on sales made by such corporations of Philippine products in the United States of America",

and after elaborating that proposition somewhat, it adds, *simply as a corollary thereto*, the statement that (Petition, p. 9, near the bottom of the page):

> "The said decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law, because the difference in the deductions granted to domestic corporations and foreign corporations with branch offices in Manila will not now correspond to and bear a reasonable relation to the difference in the base of the tax."

Wholly apart from the fact that this court has held that any such incidental inequalities of taxation which may grow out of inequalities in business conditions and activities do not affect the validity of the statute or the substantial uniformity of the rule of taxation secured by the "equal protection of the

laws" clause of the Fourteenth Amendment, of which the provision in Section 3 of the Philippine Organic Act, that "the rule of taxation in said islands shall be uniform", is substantially but a paraphrase securing the same end as that of the Fourteenth Amendment "that no greater burdens should be laid upon one than are laid upon others in the same calling and condition" (*Bells Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 238; *Field* v. *Barber Asphalt Co.*, 194 U. S. 618, 621–622; *Stebbins* v. *Riley*, 268 U. S. 137, 142–143; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351),—**petitioner's above quoted claim in this case that this decision of the Supreme Court of the Philippine Islands violates the uniformity clause of the Jones Law is wholly based upon petitioner's entire misapprehension of the Insular Court's decision.**

As already pointed out, petitioner states this claim simply as a corollary to its principal proposition in its second "Reason" above quoted, wherein it contends that the Insular Supreme Court in this case

> "*has held* that the words '*sources within the Philippine Islands*', as applied to foreign corporations with branches in the Philippine Islands, *embraces income received from profits on sales made by such corporations of Philippine products in the United States of America.*"

No other basis is anywhere suggested by petitioner, either in its petition or in its supporting brief (*cf.* Point "V," pp. 33–34, of its brief), for this claim of violation of the uniformity clause of the Jones Law, then as a corollary to its principal proposition, above quoted, that the effect of the Insular Court's decision is to hold that the words "sources within the Philippine Islands" contained in Section 10 of the Philippine Income Tax Law "embraces income received from profits on sales made by such corporations" in the United States. There is no other possible basis for petitioner's claim of violation of the uniformity clause.

BUT PETITIONER'S PRINCIPAL PROPOSITION IS BASED ON A COMPLETE MISAPPREHENSION OF THE DECISION OF THE INSULAR SUPREME COURT. *That court* NOWHERE HOLDS *that, as stated by petitioner, the phrase "sources within the Philippine Islands",*

as applied to foreign corporations with branches in the Philippine Islands, embraces income from profits on sales made in the United States.

It says nothing of the kind in its opinion (R. 26–33); nor is any such result to be implied either from its opinion or from its judgment in this case.

Quite to the contrary, that court, in its opinion, expressly recognizes (R. 30) the correctness of the rule stated in the opinion of Acting Attorney General Frierson (32 Ops. Atty's. Gen., 336), relied upon by the petitioner here (Petitioner's Brief, pp. 21–22) as well as in the court below, *that the place of sale is determinative of the "source" of the income*, within the meaning of the Philippine statute here in question, as well as within the meaning of the similar language used in the federal statute; and the Insular Court, *expressly "assuming that to be the law"* (R. 30), simply held that in point of fact, in the case here at bar, under the stipulation of facts before the court, these particular sales were actually made in the Philippine Islands, and not in the United States; and that, therefore, under the rule contended for by the petitioner itself, the resulting income was taxable in the Philippine Islands where the sales were actually made.

There is no possible substantial basis for the claim that the Insular Court has put any construction upon the Philippine statute which would make it in any way violative of the uniformity clause of the Jones Law.

And no other federal question being suggested, and the amount here involved being less than $25,000, this court is without jurisdiction of this case under Section 7 of the Act of February 13, 1925.

POINT II

EVEN IF THIS COURT HAD JURISDICTION, IT WOULD NOT DISTURB THE TERRITORIAL SUPREME COURT'S DETERMINATION THAT THE SALES HERE IN QUESTION WERE IN POINT OF FACT ACTUALLY CONSUMMATED, "MADE", IN THE PHILIPPINE ISLANDS AND NOT IN THE UNITED STATES.

A.—The territorial supreme court, construing the language used in the "Agreed Statement of Facts" before it in this

case (R. 8–12, and see "Statement of the Case", *ante*, p. 4) to the effect that the sugar, tobacco, and other commodities here in question,—produced or purchased in the Philippine Islands by petitioner's "Philippine branch",—were "sold in the United States by the agency therein of the plaintiff's Philippine branch, the sale being subject to confirmation and absolute control as to price and other terms and conditions thereof by the plaintiff's Philippine branch", *held* (R. 29–32) that that language meant that (R. 29),

> "no sale was actually consummated until after it was ratified and approved by the local branch" (the Tobacco Company's local branch in the Philippine Islands);

and that (R. 32),

> "In the instant case, the record is conclusive that all of the sources of plaintiff's income in question had their origin in or were derived from its branch office in the Philippine Islands, and that all of the sales in question were made through its branch office, and that no sale was actually consummated until such time as it was approved by the branch office both as to terms and conditions."

That is to say, that the sales were actually made within the Philippine Islands and not in the United States, in accordance with the generally recognized rule that "where an order is given for the purchase of goods to an agent who has not authority to sell, but which is forwarded to his principal for approval, the contract is deemed to be made at the place of approval" (35 Cyc., "Sales", p. 94, Note 80, and cases there cited).

B. That finding of the Philippine Supreme Court that, upon a true interpretation of the "Agreed Statement of Facts" upon which this case was tried, the sales here in question were really consummated,—that is, "made",— in the Philippine Islands, and not in the United States, and that, therefore, the income therefrom was "derived from sources within the Philippine Islands" within the meaning of the local income tax law, Philippine Act No. 2833, as amended by Act No. 2926, was *a finding of ultimate facts* by that court, *or else a finding on a mixed question of fact and of local law and of the interpretation of a local statute;* and, not appearing to be "clearly erroneous", it will not be disturbed by this court.

That finding involves no element of federal law,—nothing except a finding of ultimate facts based upon the territorial supreme court's interpretation of the stipulation or "Agreed Statement of Facts" before it in this case, in the light of general principles of law as locally applied and interpreted by that court. It is wholly within the class of cases wherein the determination of the local territorial supreme court, based upon its interpretation and application of local law, and/or its findings of fact, will not be disturbed by this court, unless "clearly erroneous". *Ling Su Fan* v. *United States*, 218 U. S. 302, 308; *Harrison* v. *Perea*, 168 U. S. 311, 323; *Cardona* v. *Quiñones*, 240 U. S. 83, 88; *Ibanez* v. *Hong Kong, etc. Banking Corporation*, 246 U. S. 621, 627; *Alzua* v. *Johnson*, 231 U. S. 106, 110; *Flemister* v. *United States*, 207 U. S. 372, 375; *Dowdell* v. *United States*, 221 U. S. 325, 327–329.

The Insular Supreme Court's determination in this case, that these sales here in question were actually consummated, "made", within the Philippine Islands by plaintiff's Philippine branch at Manila, is not "clearly erroneous". On the contrary, it is perfectly reasonable and right, and is fully supported by the entire record.

POINT III

IN ANY EVENT, THE INSULAR SUPREME COURT'S FINDING THAT THE SALES WERE CONSUMMATED,—THAT IS TO SAY, "MADE",—IN THE PHILIPPINE ISLANDS, AND NOT IN THE UNITED STATES, WAS RIGHT.

Even if the correctness of the territorial supreme court's determination of that question were to be treated as open for examination *de novo* in this court, it is in accordance with the generally accepted principles of law applicable to contracts of sale; is clearly right; and should be sustained.

The generally accepted rule is, as stated by the editors of the "Cyclopedia of Law and Procedure", quoted, *ante*, Point II, p. 11, that, "*where an order is given for the purchase of goods to an agent who has not authority to sell, but which is forwarded to his principal for approval, the contract is deemed to be*

made at the place of approval" (35 Cyc., *supra*, "Sales", p. 94, Note 80).

In a liquor case before the United States Circuit Court for the Northern District of Iowa, where the sole question involved was of the place where the sale was made, the liquor having been purchased by residents of Dubuque, Iowa, from a wholesale firm in Chicago which was suing the purchasers for the purchase price, the defense being that the contract of sale was prohibited by the laws of Iowa, and therefore void, so that the purchase price was uncollectible, and it was conceded that, if the sale was to be deemed as made in Iowa, then it was void and the plaintiffs could not recover, whereas, on the other hand, if it was to be deemed as made at Chicago in Illinois, then it was perfectly valid and the plaintiffs were entitled to recover the purchase price, it appeared that the sales were made upon orders given by the defendants at Dubuque to an agent of the plaintiffs, the vendors. The court instructed the jury that if the agent, Connors, had authority to make a completed contract of sale, and did in fact make a contract at Dubuque, then the sale was made in Iowa, and was void under the Iowa statute; but that if, on the other hand, the agent Connors was without authority to enter into a binding contract, and that the orders when received in Chicago by the plaintiffs were subject to their approval or disapproval and they were under no obligation to fill them unless approved, then the sale was to be deemed a sale made in Illinois. The jury, having found a verdict for the plaintiffs, the court (O. P. SHIRAS, J.) overruled defendants' motion for a new trial and gave the plaintiffs a judgment on the verdict, saying:

> "The point of inquiry is, when and where was the contract of sale entered into? 'A contract is an agreement in which a party understakes to do, or not to do, a particular thing.' *Sturges v. Crowninshield*, 4 Wheat. 197. A contract does not become such until the minds of the contracting parties meet. When and where did the plaintiffs agree to sell the liquors in question to the defendants? Connors certainly did not make or complete a contract with defendants, for it is admitted, in the aspect of the case now under consideration, that he had no authority to make a contract or to bind plaintiffs. The utmost that

can be said is that he, not having authority to make a contract, undertook to agree upon the terms of sale, which did not, however, bind plaintiffs until they had had given their assent thereto. The contract was made when plaintiffs, by approval, acceptance, or ratification, assented thereto. Then, in fact, for the first time, did the minds of the contracting parties meet, and thereby render binding and obligatory that which before was, in effect, only a proposition for a contract. The rule is well settled that where orders are given for the purchase of goods to an agent who has not authority to sell, but which are forwarded to the principal for his approval, the contract is deemed to be made at the place of approval."

Shuenfeldt v. *Junkermann*, 20 Fed. 357, 359-360.

And so this court has held that a contract between an individual resident of Michigan and an Ohio corporation, signed in Michigan both by the individual party and also on behalf of the corporation by its local agent there, but with a stipulation that it should not be valid unless approved by the corporation's home office at Akron, Ohio, and afterwards actually approved there, was not "made" in Michigan, but was to be considered as "made" in Akron, Ohio, upon its approval there, when it "then and there, for the first time, became a valid and binding contract between the parties"; and that it could not be considered as "made" "at any earlier time, or other place."

Holder v. *Aultman*, 169 U. S. 81, 91.

And it is immaterial that the goods may have actually been here in the United States, in the hands of the plaintiff's "agency" here, before the sales were made, since the consummation of the contract of sale, by its approval by the plaintiff's Philippine branch in Manila, operated as a constructive delivery of the title, and completed the transaction.

Thus, for instance, in another liquor case where New York importers and wholesalers imported goods through the port of New Orleans and left them there in warehouse at New Orleans and sold them on orders taken by local agents, accepted or approved by the firm's head office in New York, and the question was, for the purposes of the payment of the federal license tax, whether the sales were to be treated as made at New York where the orders were accepted or approved, or at

New Orleans where the goods were in storage in the warehouse from which they were afterwards delivered, it was *held* by the Circuit Court of Appeals for the Fifth Circuit that the sales were to be treated as made in New York; and, hence, the license tax having been paid there, that it was unnecessary to pay the tax in New Orleans; and that the fact that the goods had been in storage in New Orleans, and were delivered from that place, was immaterial; the court saying:

> "The government does not contend that the liquors were sold, or offered for sale, by plaintiffs in error at New Orleans. Its contention is that their acceptance of orders sent to them at New York, and the delivery or shipment of the goods there sold, by the public warehouseman at New Orleans, constitutes in law a sale at the latter place. Under the common law, a sale is a contract for the transfer of property from one person to another for valuable consideration, and three things are requisite to its validity, viz., the thing sold which is the object of the contract, the price, and the consent of the contracting parties. * * * Where a sale results by the acceptance of an order, the sale is made where the order is accepted. *Shuenfeldt* v. *Junkermann* (C. C.) 20 Fed. 357.
>
> "Benjamin on Sales, speaking of the formation and completion of sales (page 1), says:
>
> 'By the common law, a "sale" may be defined as a transfer of the absolute property in a thing for a price in money. * * * All that was required to give validity to a sale of personal property, whatever may have been the amount of value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that one should transfer the absolute property of the thing to the other for a money price, the contract was completely proven and binding on both parties. If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed, in the common law, "a bargain and sale of goods."'
>
> "A primary, material, and essential result which, by operation of law, flows from a completed sale, is that the title to the property in the thing sold passes, or has passed, out of the seller into the purchaser. It will be seen, from the authorities, that delivery is not an essential element in or to the completion of a sale of personal property. De-

livery, in its legal sense, may denote a transfer of title to the thing sold, or it may mean a transfer of possession. In some cases between the parties, as well as between them and other persons affected by a completed 'contract of bargain and sale of goods,' it may become necessary to consider whether the reciprocal obligations imposed by the terms of the sale, on the seller and buyer, have been performed. In such cases, delivery, whether constructive or actual, may be an evidence of performance. In the case we are considering, there is no question at issue of performance by either the seller or buyer of the liquors stored at New Orleans. It does not seem necessary to discuss the incident of delivery, or its effect on the sales made at New York by the plaintiffs in error. • • • •

"The facts in the record show clearly enough that there was a constructive delivery made at New York to the purchasers of such goods as were, at the time of the completed sale, in the warehouse at New Orleans. • • • •

"Presumably, so far as the evidence discloses the transaction between the seller and buyer, a transfer by operation of law of the title in the property sold was made by plaintiffs in error to the purchaser wherever he may have been. It may be, too, that the delivery order, which seems to have been transmitted to the warehouseman at New Orleans, designated and made certain the quantity and quality of the goods sold by plaintiffs in error at New York. If such should prove to be the case, it may follow, presumably by operation of law, that delivery, constructively, was thereby made at New York. Under the legal import of such orders, and a fair view of the facts, it may follow, too, that the warehouseman, as soon as the orders were transmitted from the seller to the buyer, ceased to be the bailee of the commercial house at New York, and became a bailee of the purchaser."

De Bary v. *Sauer*, 101 Fed. 425, 427–429.

Mutatis mutandis, that is this case. These sales were "made" in Manila.

CONCLUSION

Petitioner fails to state the specific grounds on which it invokes the jurisdiction of the court in this case, and it is submitted that nothing appears in this record to support the jurisdiction of this court to grant the writ. And even if this

court had jurisdiction, no reason is here presented for the exercise of its extraordinary jurisdiction by certiorari; no substantial federal question is presented; no question of public importance or general interest is raised; no other cases are dependent on the outcome of this suit, which turns simply upon the interpretation by the Insular Supreme Court of the "Agreed Statement of Facts" in this particular case, holding that in this specific case, upon the agreed facts before it, these sales were actually made in the Philippine Islands, and not in the United States. It is submitted that the petition should be dismissed for want of jurisdiction under Section 7 of the Act of February 13, 1925. And that, in any event, certiorari should be denied.

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